

Owens, Mike

From: David Beatty <dbeatty@utah.gov>
Sent: Tuesday, August 25, 2015 1:13 PM
To: Owens, Mike
Subject: Re: Pacificorp Hunter Lawsuit
Attachments: Sierra Club v. UDEQ Complaint (1).pdf; Permit 4 -Final-1.rtf

It is a real suit, see attached, I also attached the last permit mod dated April 6, 2015. John Jenks and Jennifer He are brushing up on the issues we had with this permit and not being able to go through with the Renewal back in 2005. We may need to call you and get your view on the issues, it had some thing to do with the CAM plan, startup-shutdown-malfunction, and an emissions minimization plan.

On Tue, Aug 25, 2015 at 10:36 AM, Owens, Mike <Owens.Mike@epa.gov> wrote:

Hi Dave. I'm not up on what's happening on this. Perhaps it would be a good idea to forward it to me. Thanks!

Mike Owens

From: David Beatty [mailto:dbeatty@utah.gov]
Sent: Tuesday, August 25, 2015 10:29 AM
To: Owens, Mike
Subject: Pacificorp Hunter Lawsuit

Just wanted to make sure you have heard about the lawsuit that Sierra Club filed against us for not issuing the Hunter renewal, if not let me know and I will forward it to you.

Gloria D. Smith, Cal. Bar No. 200824, *pro hac vice pending*
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) The Hon.

INTRODUCTION

1. With this complaint, Sierra Club requests that the Court compel the Director of the Utah Division of Air Quality to finally act upon an air quality permit that has languished before the agency for over twelve years. More specifically, the case stems from Utah agencies' and officials' failure to act on a permit application to renew the operating permit for the 1,320-megawatt Hunter coal-fired power plant; a permit that is necessary to give the public assurance that the plant is complying with current law.

2. Utah law requires major sources of air pollution, like the Hunter plant, to undergo a permitting process to renew their operating permit every five years to ensure compliance with the most current state and federal requirements. The permitting process includes opportunity for public participation. PacifiCorp, the power plant's operator,¹ submitted an application to renew the Hunter permit in 2001.

3. Even though agency officials had a mandatory duty to act within 18 months on the Hunter application, the operating permit has never been renewed. Therefore, Defendants violated their mandatory duty under the Utah Conservation Act and its implementing regulations and continue to violate that duty to this day.

4. As set forth below, Sierra Club seeks judicial review of Defendants' failure to take action on Hunter's operating permit renewal application, and an order compelling Defendants to take final action by a date certain pursuant to Utah Code Ann. § 19-2-109.1(10)(c); a declaration establishing that Defendants have violated the mandatory, non-

¹ PacifiCorp, an Oregon for-profit corporation, is the majority owner in the three units operated at the Hunter Plant. In addition, Deseret Transmission & Generation Cooperative (Deseret), the Utah Associated Municipal Power Systems (UAMPS), and the Utah Municipal Power Agency (UMPA) have minority stakes in certain of the Hunter Plant's units.

discretionary duty to take final action on the Hunter's operating permit renewal application pursuant to Utah Code Ann. § 78B-6-401; and, in the alternative, an extraordinary writ or writ of mandamus issued pursuant to Rule 65B mandating that Defendants take final action on the operating permit renewal application by a date certain.

FACTUAL BACKGROUND

5. The Hunter plant is a 1,320 megawatt, three-unit coal-burning power plant located approximately three miles south of Castle Dale, Utah on Highway 10 in Emery County. The Hunter coal plant emits large amounts of harmful air pollutants, including sulfur dioxide, nitrogen oxides, particulate matter of 10 microns or less, carbon monoxide, volatile organic compounds, hazardous air pollutants, and greenhouse gases.

6. Individually and collectively, these pollutants contribute to acid rain, regional haze/visibility impairment, the formation of ground level ozone or smog, climate change and other processes harmful to human health and the environment.

7. Under state law, PacifiCorp must obtain various air quality permits to regulate the Hunter coal plant's air pollution emissions.

8. In 1998, PacifiCorp obtained an initial operating permit from the state of Utah to cover its air pollution emissions for the Hunter plant.

9. PacifiCorp's 1998 operating permit included an expiration date five years later in 2003.

10. On approximately December 21, 2001, PacifiCorp submitted an operating permit renewal application to Defendants.

11. PacifiCorp's permit renewal application was deemed complete by operation of law on or before February 22, 2002.

12. Because Defendants have a mandatory, non-discretionary duty to take final action on operating permit applications within eighteen months of receiving a complete application, Utah Admin. Code r. 307-415-7a(2), Defendants were required to take final action on the Hunter renewal permit application by approximately August 22, 2003.

13. Had Defendants complied with state law, Hunter's operating permit would have been renewed in 2003, 2008 and 2013.

14. To date, Defendants have failed to take final action on the Hunter plant's operating permit renewal application.

PARTIES

Plaintiff Sierra Club

15. Sierra Club is dedicated to exploring, enjoying, and protecting the wild places of the earth; to practicing and promoting the responsible use of the earth's ecosystems and resources; and to educating and enlisting people to protect and restore the quality of the natural and human environment. Sierra Club has approximately 630,000 members, including approximately 4,000 members in Utah.

Sierra Club's Injuries and Interest

16. As described above in Section II, the Hunter coal plant emits large amounts of harmful air pollutants. The Hunter plant is a major source of nitrogen oxides (NOx) pollution, and Sierra Club members are reasonably concerned that Hunter's NOx emissions contribute to the formation of very fine particles that penetrate deeply into sensitive parts of lungs and damage health, cause premature death, breathing problems, damage lung tissue, and cause or worsen emphysema, bronchitis and heart disease. They are also concerned that Hunter's NOx emissions

contributes to acid rain, diminishes water quality, impairs visibility and causes ground-level ozone, or smog, which triggers serious respiratory problems.

17. The Hunter plant is a major source of sulfur dioxide (SO₂) pollution, and Sierra Club members are reasonably concerned that Hunter's SO₂ emissions causes a wide variety of health problems, including premature death, respiratory problems like asthma, and aggravation of heart disease. Sierra Club members are also concerned that SO₂ emitted from the Hunter plant degrades visibility by forming regional haze.

18. Air quality modeling indicates that Hunter's emissions are causing significant exceedances of the 1-hour average National Ambient Air Quality Standard (NAAQS) for SO₂.

19. The Hunter plant is also a major source of particulate matter (PM) pollution, or "soot." Sierra Club members are concerned about these emissions from Hunter because breathing particulate pollution causes premature death, heart attacks, strokes, birth defects, asthma attacks, lung damage, and low birth weight. Sierra Club is concerned that Hunter's particle pollution is especially dangerous for the elderly, children, and those with respiratory illnesses. Additionally, Sierra Club members are concerned that Hunter's particulate pollution also causes haze and impairs visibility and alters nutrient balances in waters and soils.

20. Sierra Club members live, work and recreate in areas of Utah impacted by air pollution from the Hunter plant. Hunter's air pollution has harmed and continues to harm Sierra Club's members' aesthetic, recreational, environmental, economic and/or health-related interests.

21. Sierra Club and its members have been harmed by Defendants' failure to take final action on Hunter's renewal permit application because the renewal process ensures that Hunter is operating in compliance with all procedural and substantive requirements of the

operating permit program, including all current state and federal requirements, to prevent unlawful pollution and its harmful impacts on public health and the environment.

22. Defendants' failure to take action on Hunter's renewal permit application has denied Sierra Club the opportunity to comment and participate in the Hunter's renewal permitting process, which includes the right to petition EPA to object to any proposed renewal operating permit.

23. Sierra Club is an appropriate party with the interest necessary to assist the Court in reviewing factual and legal questions raised in this case. *See generally Utah Chapter of Sierra Club v. Utah Air Quality Bd.*, 2006 UT 74, P34-P44 (Utah 2006) (a party has standing if it is "an appropriate party raising issues of significant public importance."). Sierra Club has the interest, expertise and resources necessary to investigate and evaluate all the relevant legal and factual questions relating to the issues presented by this action.

24. No party other than Sierra Club is likely to raise the issues presented in this case in any other forum.

25. The Sierra Club and its members have a strong interest in ensuring that the Defendants and the Hunter plant fully comply with all procedural and substantive requirements of the operating permit program, including all state and federal requirements, to prevent any unlawful pollution and its harmful impacts on public health and the environment.

26. The Sierra Club and its members also have a strong interest in ensuring that they and the public at large are afforded the opportunity to fully participate in permitting processes and proceedings for the Hunter plant, and that Hunter's operating permits and renewals are subject to adequate governmental oversight. Sierra Club intends to comment on any draft renewal operating permit issued by Defendants for the Hunter plant.

27. The issues raised by this action are of sufficient public importance in and of themselves to confer standing on the Sierra Club, including, without limitation, the harms and risks stemming from Defendants' failure to act on Hunter's operating permit renewal application in conformity with mandatory, non-discretionary requirements, which are crucial in reducing the harm and risks associated with the emission of air pollution from large sources in Utah.

28. Unless this court orders Defendants to comply, Defendants will continue to violate the law by failing to take final action on Hunter's operating permit renewal application, failing to provide all required opportunities for public participation and for governmental oversight, and failing to implement Utah's operating permit program with the regulatory rigor and transparency that the Utah operating permit program requires. Consequently, Sierra Club's members will continue to be harmed by the Defendants' inaction.

29. A favorable ruling for Sierra Club and its members will redress its injuries because it will require Defendants to take final action on Hunter's operating permit renewal application and to issue a renewal operating permit to regulate operations at Hunter that complies with current state and federal laws.

Defendants

30. In his official capacity, Bryce Bird, as the current Director of the Utah Division of Environmental Quality's Division of Air Quality, is responsible for the actions of the Division of Air Quality and for administering the Utah Air Conservation Act. Relevant here, the Director is responsible for taking final action on applications for operating permits and operating permit renewals.

31. The Division of Air Quality is the division of the Department of Environmental Quality responsible for administering the Utah Air Conservation Act.

32. The Department of Environmental Quality is the Utah state agency responsible for, *inter alia*, safeguarding public health and quality of life by protecting and improving environmental quality in Utah, includes the Division of Air Quality, and is responsible for administering the Utah Air Conservation Act.

33. In his official capacity, Alan Matheson, as the current Executive Director of the Department of the Environmental Quality, administers and manages the Department of Environmental Quality, which includes the Division of Air Quality, and is responsible for administering the Utah Air Conservation Act.

JURISDICTION AND VENUE

34. This Court is vested with jurisdiction over this case pursuant to Utah Code Ann. § 78A-5-102(2) and (7)(a), Rule 65B of the Utah Rules of Civil Procedure, and Utah Code Ann. § 63G-4-402(1)(a).

35. Venue is appropriate in Salt Lake County, Utah because that is where this case arises, where Defendants reside and/or principally carry out their official duties. Utah Code Ann. § 78B-3-307(1)(a) and (b); Utah Code Ann. § 63G-4-402(1)(b).

LEGAL BACKGROUND

The Federal Clean Air Act

36. Congress passed the Clean Air Act in 1970 “to protect and enhance the quality of the Nation’s air resources so as to promote the public health and welfare and the productive capacity of its population.” 42 U.S.C. § 7401(b)(1). Employing a model of cooperative federalism, the Clean Air Act places the primary responsibility for enforcement on state and local governments, but also provides for “Federal financial assistance and leadership . . . for the

development of cooperative Federal, State, regional, and local programs to prevent and control air pollution.” 42 U.S.C. § 7401(a)(3) and (4).

37. EPA is responsible for identifying air pollutants that may endanger public health and welfare and for promulgating standards for the maximum allowable concentrations of each such pollutant in the air, known as National Ambient Air Quality Standards (NAAQS). 42 U.S.C. §§ 7408(a) and 7409. The Clean Air Act further requires EPA to divide each state into air quality control regions, *see* 42 U.S.C. § 7407(b)-(c). Each air quality control region is labeled as either “attainment” or “nonattainment” for each identified pollutant depending on whether the average level of that pollutant in the air in that region is at or below (attainment) or above (nonattainment) the level mandated by the NAAQS.

38. Each state must submit to EPA a State Implementation Plan (SIP) establishing “enforceable emission limitations and other control measures” designed to preserve attainment of the NAAQS in attainment areas and achieve attainment in nonattainment areas. 42 U.S.C. § 7410.

Title V of the Federal Clean Air Act

39. In 1990, Congress enacted Title V of the Clean Air Act, 42 U.S.C. § 7661-7661f, to require major stationary sources of air pollution to obtain operating permits incorporating Clean Air Act requirements and to establish a procedure for federal authorization of state-run Title V permitting programs. *See* 42 U.S.C. §§ 7661 -7661f; 40 C.F.R. part 70; 57 Fed. Reg. 32250 (July 21, 1992).

40. The Title V operating permit program is crucial to the implementation of the Clean Air Act because a Title V operating permit “contains, in a single, comprehensive set of documents, all [Clean Air Act] requirements relevant to the particular polluting source. In a

sense, a permit is a source-specific bible for Clean Air Act compliance.” *Virginia v. Browner*, 80 F.3d 869, 873 (4th Cir. 1996).

41. Title V requires EPA to establish minimum elements for each state’s comprehensive operating permit program. 42 U.S.C. § 7661a(b). For example, the state program must contain “[a]dequate, streamlined, and reasonable procedures for expeditiously determining when [permit] applications are complete, for processing such applications, for public notice, including offering an opportunity for public comment and a hearing, and for expeditious review of permit actions, including applications, renewals, or revisions.” 42 U.S.C. § 7661a(b)(6); *see also* id. § 7661a(b)(8).

42. The Clean Air Act requires that state permitting programs provide “an opportunity for judicial review in State court of the final permit action by the applicant, any person who participated in the public comment process, and any other person who could obtain judicial review of that action under applicable law.” 42 U.S.C. §§ 7661a(b)(6); *see also* 40 C.F.R. § 70.4(b)(3)(x).

The Utah Air Conservation Act Permitting Program

43. EPA approved the Utah operating permit program on June 8, 1995, with an effective date of July 10, 1995. 60 Fed. Reg. 30192, 30194-95 (June 8, 1995). Through this delegation of the Title V permitting program, the Director of the Division of Air Quality became the Administrator’s “designee” as referred to in 40 C.F.R. § 70.2.

44. The requirements of the Utah operating permit program are set forth in the Air Conservation Act, Utah Code Ann. § 19-2-109.1 *et seq.*, and its implementing regulations, Utah Admin. Code r. 307-415-1 *et seq.*

45. Consistent with the Clean Air Act requirements, Utah’s operating permit statute

and its implementing regulations require that all major sources of air pollution such as the Hunter plant obtain an operating permit which must be issued for a fixed term of five years. Utah Code Ann. § 19-2-109.1 (2) and (3), Utah Admin. Code r. 307-415-6a(2); *see* 42 U.S.C. § 7661a(a) and (b)(5)(B); 40 C.F.R. § 70.4 (b)(iii)(3).

46. During the course of the review of each initial operating permit and each renewal, Defendants must determine whether the source is operating in compliance with federal and state law, impose a schedule of compliance if necessary, and update the monitoring, record keeping, reporting and certifications and other important aspects of the Title V operating permit as needed. *See, e.g.*, Utah Admin. Code r. 307-415-1; 307-415-5c(3)(c), (4), (5) and (8); 307-415-6a(1); and 307-415-6c(1), (3), (4) and (5).

47. Each operating permit and permit renewal issued pursuant to the Utah Air Conservation Act and its implementing regulations must include, *inter alia*, enforceable “emission limitations and standards, including . . . operational requirements and limitations” to “assure compliance with all *applicable requirements* at the time of permit issuance . . .” (emphasis added). Utah Admin. Code r. 307-415-6a(1); 307-415-5c(4) and (5); *see also* 42 U.S.C. § 7661c (a); 40 C.F.R. § 70.1(b).

48. “Applicable requirements” are defined by Utah Admin. Code r. 307-415-3(2)(a) and (k) to include, among other things, “[a]ny standard or other requirement provided for in the State Implementation Plan” . . . [and] . . . “[a]ny standard or other requirement under rules adopted by the Board.”

49. A permitted Title V source must submit a complete operating permit renewal application prior to the deadline established in the existing permit, which the Director must set at least six months before the expiration of the existing operating permit.

50. An application is deemed complete 60 days after the state receives it, unless the state notifies the permit applicant that it requires further information or otherwise notifies the applicant of incompleteness. Utah Admin. Code r. 307-415-7a(3).

51. Pursuant to Utah Admin. Code r. 307-415-7a(2), the Director has a mandatory, non-discretionary duty to “take final action on each permit application, *including a request for permit modification or renewal*, within 18 months after receiving a complete application.” (emphasis added); *see also* 40 C.F.R. § 70.4(b)(6).

52. The failure of the state to act on any operating permit application is deemed a final administrative action for the purpose of obtaining judicial review in state court. Utah Code Ann. § 19-2-109.1(10); *see also* 42 U.S.C. § 7661a(b)(7); 40 C.F.R. § 70.4(b)(3)(xi).

FIRST CAUSE OF ACTION
(Violation of the Utah Air Conservation Act)

53. Sierra Club realleges and incorporates by reference all prior paragraphs of this petition as if fully set forth below.

54. Under the regulations that implement the Utah Air Conservation Act, “the director shall take final action on each permit application...within 18 months after receiving a complete application.” Utah Admin. Code r. 307-415-7a(2).

55. The operating permit renewal application for the Hunter plant was submitted on approximately December 21, 2001 and, pursuant to Utah Admin. Code r. 307-415-7a(3), was deemed complete sixty days later on approximately February 22, 2002.

56. Defendants held a nondiscretionary duty to take final action on the Hunter power plant’s renewal application within eighteen months after receiving a complete application. Utah Admin. Code r. 307-415-7a(2).

57. Defendants have been in violation of the law since approximately August 22, 2003 and have continued to violate the law by failing to perform this mandatory duty to act on the permit renewal application for the Hunter power plant. Defendants' failure to take final action on Hunter's permit renewal application constitutes a violation of the Utah Air Conservation Act and its implementing regulations. Utah Code Ann. § 19-2-109.1(10); Utah Admin. Code r. 307-415-7a(2).

58. Defendants' failure to take final action constitutes a "final administrative action [] for the purpose of obtaining judicial review." Utah Code Ann. § 19-2-109.1(10).

59. Sierra Club is a "person who could obtain judicial review of that action under applicable law." Utah Code Ann. § 19-2-109.1(10)(c).

SECOND CAUSE OF ACTION
(Request for Declaratory Judgment)

60. Sierra Club realleges and incorporates by reference all prior paragraphs of this petition as if fully set forth below.

61. Under Utah law, the district court has "the power to issue declaratory judgments determining rights, status, and other legal relations within its respective jurisdiction." Utah Code Ann. § 78B-6-401(1).

62. Defendants' failure to take final action on Hunter's operating permit renewal application is an unlawful action.

63. Sierra Club seeks a declaratory judgment establishing that Defendants' failure to take final action on Hunter's operating permit renewal application was and continues to be unlawful and asks the District Court to determine the rights of the parties pursuant to Utah Code Ann. § 78B-6-401.

THIRD ALTERNATIVE CAUSE OF ACTION
(Petition for Extraordinary Relief Pursuant to Rule 65B)

64. Sierra Club realleges and incorporates by reference all prior paragraphs of this petition as if fully set forth below.

65. In the alternative, if this Court determines that Sierra Club is not entitled to relief under Utah Code Ann. § 19-2-109.1(11), Sierra Club petitions this Court to issue a writ of mandamus or extraordinary writ pursuant to Rule 65B(d)(2)(B) of the Utah Rules of Civil Procedure.

66. Sierra Club is an aggrieved person whose interests and the interests of its members are impacted by Defendants' failure to take final action on the Hunter plant's operating permit renewal application.

67. By failing to take final action on the Hunter plant's operating permit renewal application, Defendants have failed and continue to fail to perform a mandatory, non-discretionary act that was plainly required by law as a duty of office, trust or station.

68. Sierra Club and its members have a clear legal right under the Utah Air Conservation Act and its implementing regulations to have Defendants take final action on the Hunter plant's operating permit renewal application. Utah Code Ann. § 19-2-109.1; Utah Admin. Code r. 307-415-7a(2). Sierra Club and its members have an interest in the public permitting process and will comment on any draft renewal permit for the Hunter plant issued by Defendants.

69. Unless this Court issues an extraordinary writ, or writ of mandamus pursuant to

Rule 65B(d)(2)(B) requiring Defendants to take final action on the Hunter plant's operating permit renewal application, Sierra Club will have no other no plain, speedy or adequate remedy at law to address Defendants' failure to take action.

70. Accordingly, Sierra Club requests this Court to issue an extraordinary writ, or writ of mandamus pursuant to Rule 65B(d)(2)(B) requiring Defendants to take final action on the Hunter plant's operating permit renewal application by a date certain in the immediate future.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff/Petitioner Sierra Club respectfully requests that this Court grant the following relief:

- A. Declare that Defendants have violated and continue to violate the Utah Air Conservation Act by failing to take final action on the Hunter plant's operating permit renewal application;
- B. Order Defendants to take final action on the Hunter plant's operating permit renewal application by a date certain; and
- C. Grant such other relief as this Court deems just and proper.

Dated this 21st day of August, 2015.

Respectfully Submitted,

/s/ Meghan Dutton, Attorney
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